PRIVY COUNCIL REPORT

MALAYAWATA STEEL BERHAD v. GOVERNMENT OF MALAYSIA & ANOR.

[P.C. (Lord Diplock, Lord Elwyn-Jones, Lord Russell of Killowen, Lord Keith of Kinkel & Lord Lane) March 10-12 & May 12, 1980]

[Privy Council Appeal No. 13 of 1978]

Equity — Equitable assignment — Assignment of right to receive payment from respondent for steel supplied by appellants to construction company — Provision for checking and certification — Mere machinery for operation of equitable assignment.

The appellants in this case had claimed payment of the sum of $215,618.68 being the balance of payment due for the supply of steel to a construction company for the Radio House project of the Government. The claim was based on an equitable assignment alleged to have been made in favour of the appellants with the construction company as assignor and the Government as the debtor. The Government had agreed to pay the cost of steel supplied direct to the appellants, after checking and certification by the construction company, but in some cases had paid the amounts due to the construction company. Both the learned trial judge and the Federal Court on appeal (see [1977] 2 M.L.J. 215) held that there had been no valid equitable assignment as payment was subject to a request or authorization by the construction company and the claim was dismissed. The appellants appealed.

Held: there was here a valid equitable assignment of progress payments due to the construction company in so far as payment for the relevant steel supplied was due and outstanding and therefore judgment should be entered against the respondent Government for the amount claimed.

PRIVY COUNCIL APPEAL FROM MALAYSIA.

Nicholas Phillips Q.C. (*Chin Yew Meng* with him) for the appellants.

D.K. Reattee Q.C. (*J. Phillips* with him) for the respondents.

Cur. Adv. Vult.

Lord Russell of Killowen (delivering the judgment of the Board): The primary question in this appeal is whether there was an equitable assignment of progress payments, to become due under a building contract to the main contractor, in favour of the appellants, suppliers to the main contractor of deformed steel bars for use in the proposed building.

The respondent Government arranged for the construction in Kuala Lumpur of a Radio Centre. The contract for its construction was awarded to Ng Keng Hooi ("NKH"). The contract and tender documents no doubt specified in detail requirements for deformed steel bars of particular specification and dimensions. NKH negotiated with the appellants ("MSB") for the manufacture and supply to NKH for incorporation in the Radio Centre of a substantial tonnage of the necessary steel bars. MSB before committing themselves wanted some assurance that payment therefor would in due course be forthcoming and asked for either a guarantee from the Government or an irrevocable bank credit. Neither was forthcoming. Work on the project was likely to be held up if MSB would not agree to supply and an arrangement was reached under which, to use for the moment imprecise terms, MSB was to look for payment through progress payments which from time to time would become due under the building contract from the Government to NKH.

The Government is referred to in the correspondence as the Public Works Department ("PWD") and sometimes as "JKR" meaning the same.

MSB contend that the arrangement referred to above amounted to a contract by NKH for valuable consideration that any sums to become due to NKH from PWD by way of progress payments should be paid by PWD to MSB to the extent to which at any relevant time payment was due to MSB for steel bars supplied to NKH for the Radio Station project, which contract would operate *pro tanto* as an assignment in equity by NKH to MSB of progress payments as they fell due for payment. There is no objection in law to such a proposition if the facts warrant it. An equitable assignment if for value can operate on future debts or choses in action, and is not required to operate on the whole debt or chose in action. Equally it is clear that if the debtor (e.g. PWD) knows of the assignment and pays the debt nevertheless to the assignor he may be held liable to the assignee.

This appeal arises in proceedings in which MSB contend that there was an equitable assignment of progress payments of which PWD was aware: that, ignoring the assignment, some progress payments were made to NKH which should have been made to MSB; and that as a result MSB are short of $215,618 in payment for steel bars supplied, which sum would have been satisfied had PWD paid the progress payments to MSB instead of to NKH. NKH it is to be remarked became bankrupt, and after a lapse of some months the project was continued under a substituted contractor: this however was after MSB had supplied all its contracted steel bars to NKH.

At first instance the learned judge dismissed the claim of MSB on the ground that there was no assignment in equity of the progress payments: he also decided against MSB on other grounds to which reference will later be made. On appeal the Federal Court upheld the view that there was no assignment, and did not deal with the other matters.

With those preliminary observations their Lordships turn to the critical documents: they add here that it is trite law that no particular form is required to constitute an equitable assignment, provided that it sufficiently clearly emerges from the documents (if there be writing) that it was the intention that in relation to the debt or chose in action the alleged assignee was to stand in the shoes of the assignor as claimant against the debtor.

On July 20, 1968 NKH wrote to MSB with copy to PWD as follows:

"Re: Supply of Deformed Bars for Radio House Project, K. Lumpur

This is to confirm the telephone conversation between your sale officer, Mr. Ting Buoi Ho and our Mr. K. D. Lim at 9.20 a.m. to-day in respect of the term of payment for your above steel supply will be accepted if the P.W.D. is authorized to deduct the amount from our interim payment and made direct payment to you instead of a J.K.R. guarantee, as stated in your letter reference MYS/BUS-74/0059/68 dated 2nd July, 1968."

This is clearly an agreement that if MSB supply the steel bars the interim payment (i.e. progress payments) are to be utilised by direct payment by PWD to MSB of the amount due for steel bars, this to take the place of the previously suggested government gua-

rantee of the steel payments. On the same day NKH wrote to PWD, copy to MSB, as follows: —

"Deformed Bars for Radio House Project

Further to our letter reference NKH/569/68 dated 8th instant to Messrs. N.J. Pappas & Associates with a copy to you in respect of our last paragraph on the term of payment for the supply of deformed steel bars, we have the pleasure to inform you that Malayawata Steel Berhad is willing to accept an alternative arrangement of payment as stated in our letter to Malayawata Steel Berhad vide reference NKH/616/68 dated 20th instant.

In this connection, we hereby agree to authorize the PWD to deduct from our progress payment and make direct payment to Malayawata Steel Berhad on the amount of steel supplied for the above project. We would like to have your written confirmation with a copy to Malayawata Steel Berhad that the PWD can arrange the above.

Your kind co-operation to give us an early reply would be greatly appreciated as the project has been seriously delayed and in which is no fault of ours."

This letter appears to their Lordships to confirm the position, that as between NKH and MSB, progress payments due from PWD to NKH are to be made not to NKH but to MSB in place of NKH to the extent that they are needed to meet the entitlement of MSB to payment under their contract to supply steel bars to NKH for the building project.

Thus far in their Lordships' opinion the arrangement disclosed has the necessary marks and ingredients of equitable assignment sufficiently clearly displayed.

On August 8, 1968 PWD wrote to NKH (copy to MSB) as follows: —

"Deformed Bars for Radio House Project

I would refer to your letter NKH/617/68 dated 20 July, 1968, requested this Department to deduct from your progress payments the value deformed steel bars and pay direct to Malayawata Steel Berhad, of 5th Floor, Bangunan Bank Bumiputra, 21 Jalan Melaka, Kuala Lumpur.

2. Your request has been considered by the Treasury and has been approved. However, please note that for purpose of progress payments, the deformed steel bars (whether as unfixed materials on site or incorporated in the works) will be valued in accordance with the conditions of contract. To assist the Quantity Surveyor in assessing the quantities of steel brought on to the site, please arrange for copies of Malayawata's delivery notes of the steel to be sent to this office."

It should be explained that in calculating the amount of progress payments under the contract the building so far as erected was brought in at 90 per cent of its proportion of the contract price, but materials on site not yet incorporated in the building were brought in at only 75 per cent of value. The sentence in that last letter beginning "However" is not in their Lordships' opinion to be taken as indicating more than it says, i.e. an indication that any progress payment may not cover the NKH-MSB contract price of steel bars previously delivered. In particular it does not indicate that that contract value is to be reduced, e.g., to 75 per cent nor that only that part of any progress payments attributable to steel bars is in the view of PWD the subject of the arrangement.

On August 10, 1968 NKH wrote to PWD (copy to MSB) as follows: —

"Deformed Bars for Radio House Project

We thank you for your letter reference (278) dlm. PKR.B 15/229/Q6 of 8th instant informing us that the Treasury has approved our request as contained in our letter to you of 20th July 1968.

We confirm that we are agreeable to the suggestion contained in paragraph 2 of your letter under reference."

In their Lordships' opinion the second paragraph of that letter refers only to the last sentence of the former letter, namely the request that MSB's delivery notes of steel bars should be copied to PWD to assist the Quantity Surveyor to assess the quantities brought on to the site, obviously for the purpose of calculating progress payments.

On August 10, 1968 NKH wrote to MSB and forwarded to MSB a copy of the letter of August 8 from PWD "which is self explanatory for your information", a phrase which does not suggest that any new factor was in the view of NKH thereby introduced into the agreement between NKH and MSB as to direct payment for the steel bars by PWD. The letter continued that NKH would "therefore" be obliged if MSB would arrange for the supply of steel bars for the Radio House project to be delivered to the project site. A letter of August 12, 1968 from NKH to MSB should be noted (on a point later considered) as also showing that the arrangement between NKH and MSB was for delivery on the building site of the steel bars ordered.

By August 22, 1968 MSB had delivered to the site steel bars at a total contract price of $83,974.45, and on that date wrote as follows, with copy to PWD:—

"Deformed Bars for Radio House

We refer to your letter NKH/689/68 dated 10 August 1968 and are pleased to note that the Jabatan Kerja Raya has agreed to deduct from your progress payments the value of deformed steel bars and pay direct to Malayawata Steel Berhad.

As ordered in your letter NKH/630/68 of 25 July 1968 for 1,200 L/Tons of High Tensile Deformed Bars, we have delivered accordingly part of your Order and hereby we enclose the relevant Invoices etc. as follows:—

Invoice	*Delivery Order*	*Delivery Slip*	*Cert. of Inspection*
(A) 287	DA1185	2015	Q-048 to 054
(A) 301	DA1202	2024 & 2025	Q-072 to 074
(A) 307	DA1212	2035 & 2036	Q-083 & 084
(A) 327	DA1278	2057 & 2058	RO21 & 022

The total amount of the above four invoices is $83,974.45. Kindly arrange with the Jabatan Kerja Raya to deduct the amount from your progress payments."

These four invoices each had in a "Remarks" column the words "To Radio House Site Bukit Putri Kuala Lumpur", a point to be noted later.

On August 14, 15 and 16, 1968 MSB delivered three more invoices for the steel bars to NKH (invoice numbers (A)337 (A)344 and (A)366 for a total of $81,938.85 making the first four invoices a total of $165,913.30. The first of these three had under "Remarks" only "to K.L.": the other two had the full reference to the Radio House site.

On September 10, 1968 PWD sent to NKH a calculation leading to a recommended 4th progress payment of $108,767.31. The calculations state as 75 per cent of value of steel on site bought by NKH from MSB the figure of $120,852.57: 75 per cent of the value of steel in the first seven invoices would be $124,434.97: but it may be that the difference is accounted for by some incorporation in the building.

This sum of $108,767.31 (the fourth progress payment) was paid direct by PWD to MSB.

On September 13, 1968 NKH wrote to MSB (copy to PWD): this acknowledged the first seven invoices, and said that NKH was checking the amount of steel bars received at site, and in the meantime had no objection to the payment by PWD to MSB of the fourth progress payment. This letter concluded as follows: —

"We wish to draw your attention to the arrangement agreed between you and our Messrs. Lim and Ooi for you to forward all your Invoices to us for checking and verification first and thereafter we will forward your Invoices together with our recommendation for payment to Jabatan Kerja Raya. Please therefore note that in future you should not forward any Invoices to Jabatan Kerja Raya direct but will follow the procedure as stated above so as to avoid referring back and forth as the most important things is that all tonnage received must be checked and confirmed by us first."

Their Lordships observe that they see nothing in that letter and the machinery suggested inconsistent with an equitable assignment. On September 18, 1968 MSB wrote to NKH as follows (copy to PWD): —

"Deformed Bars for Radio House

We refer to our yesterday's telephone conversation in which you have requested us to send all the invoices to your Company for checking, and thereafter you will forward immediately the duplicate invoices to the PWD Headquarters to arrange deduction from your progress payments.

We confirm we have agreed to this arrangement and are pleased to note that you have also promised to submit the duplicate invoices to the PWD as soon as you have completed the checking and will copy us the letter addressed to the PWD indicated therein the amount to be deducted from your progress payments."

On September 14, 1968 NKH had written to PWD as follows: —

"Radio House — Large Auditorium

With reference to our letter to Messrs. Malayawata Steel Berhad dated 13th instant, copy to you, we wish to inform you that all future Invoices regarding the delivery of deformed steel bars will contain our confirmation as to the actual amount received by us at Site.

This procedure will ensure that before you recommend payment you are assured that everything is in order.

We hope that this arrangement is agreeable with you."

On the same date NKH had ordered from MSB a further instalment of steel bars for the Radio House project, asking for speedy delivery.

On October 10, 1968 NKH wrote to PWD applying for a fifth progress payment of $111,642.37. The NKH calculations leading to this included a figure of MSB steel on site as $125,252.20. On October 11, 1968 there was prepared for PWD a fifth progress payment calculated at $80,330, copy to NKH. Those calculations showed a figure of MSB steel on site at $117,424.87.

On October 12, 1968 NKH wrote to PWD as follows: —

"Malaysian Broadcasting Centre comprising of Radio House, Two Office Towers and Large Auditorium at Bukit Putri, Kuala Lumpur

We wish to inform you that as from now all payments due to us should be made payable to the account of Ng Kong Hooi Construction at Sherikat Southern Banking Berhad, Kuala Lumpur, Account No. 524-1.

My letter of 16 December 1967 reference NKH/754/67 is hereby rescinded."

Their Lordships assume that this was a change of Bank. No copy of this letter was sent to MSB. This progress payment of $80,330 was later made by PWD direct to NKH, which MSB say was wrong having regard to the alleged assignment.

On October 28, 1968 NKH ordered from MSB a further instalment of 90 tons of steel bars for the project for immediate delivery.

On November 9, 1968 NKH wrote to PWD (referring to the NKH letter to MSB of September 13, 1968 but erroneously as November 13) enclosing certified copies of MSB invoices — the first seven totalling $165,813.30 for steel received at site, on which "you have already made a payment of $108,767." The letter concluded "we will be sending you our second batch of certified invoices in a few days to enable payment to be made to [MSB]."

On November 13, 1968 NKH applied to PWD for a sixth progress payment of $122,802.61. NKH calculations showed MSB steel on site as $86,487.80. The sixth progress payment was allowed at $69,419 without separate reference to MSB steel on site. This also was later paid by PWD direct to NKH.

On November 18, 1968 NKH forwarded to PWD certified invoices from MSB for a second lot of seven invoices to the value of $162,846.80 by letter copied to MSB. The latter stated that the relevant steel "had been delivered to site", i.e. the Radio House site. In these invoices the Remarks columns all stated only "To Kuala Lumpur".

By this time there were 14 invoices for steel certified by NKH to have been delivered at the project site by MSB totalling in value some $328,660. All that had been paid direct to MSB was some $108,767.

On November 21, 1968 MSB wrote to PWD stating (for information) a total of $371,293.96 as the value of steel bars "delivered to NKH for Radio House" on 18 invoices, leaving a figure (less $108,767 received) of $262,526.96. "Though we understand that you are only in a position to settle the above after you have received the certified invoice from [NKH] we are of opinion that meanwhile you should be kept informed of relevant details".

On December 9, 1968 NKH wrote to PWD — no copy to MSB — asking for a seventh progress payment to be made to them before the 20th as NKH had to pay their workers and expenses before the coming holidays. In fact a seventh progress payment at a figure of $119,820 had been notified to NKH dated December 7, 1968.

In addition to the earlier payments direct to NKH of the fifth and sixth progress payments, on December 19, 1968 PWD wrote to NKH (copy to MSB) saying that of the sum of $119,820 for the seventh progress payment "The sum of $109,920 is for the steel supplied to you by [MSB] and should be due to them when you receive this payment." That letter showed a misapprehension by the writer as to the "arrangement" (a) in that payment was not being made direct to MSB and (b) (apparently) that only that part of a progress payment which was attributable to MSB steel

on site, and at presumably 75 per cent of its value, was in any way the concern of MSB. This letter is by no means the last document to exhibit some confusion; but it must be borne in mind that if a bargain is made subsequent misunderstandings of its effect in law, not amounting to an agreed variation, will not throw light on the nature and scope of the bargain. "Tell me what the parties later said and did and I will tell you what their original writings amounted to" is an unsound approach.

On December 24, 1968 MSB (having received as stated a copy of the letter of December 19, 1968 PWD to NKH), wrote to NKH as follows:

"Radio House — Steel Progress Payment No. 7 Contract No. JKR/PER/IP/160 of 1967.

According to arrangements made between yourselves JKR and ourselves, JKR will pay us direct for all steel delivered to you against the above contract.

In November we received our payment direct.

In December, due to an oversight, the JKR included an amount of $109,920 due to us in their cheque to you for $119,820. In this connection please refer to JKR letter to you of the 19 December, 1968 ref. No. (22) dlm. PKR. B15/229/Q6/PC.3. We understand that this cheque was collected by you from the Treasury on the 19 December, 1968 and as $109,920 is due to us, we shall be grateful if you will kindly send us your cheque for this amount by return."

It will be observed that while MSB adhered to an arrangement for direct payment, they did not protest that the full 7th progress payment should have been paid direct to them, though this was at a time when there was outstanding on actually certified invoices some $219,000, and on invoiced deliveries even more.

The 7th progress payment into NKH's bank account was obviously swallowed up in an overdraft. On December 26, 1968 NKH wrote to PWD (copy to MSB) indicating this, saying (with at least doubtful sincerity) that after receiving the letter of December 19, 1968 from PWD they came to know that $109,920 was actually due to MSB, and, continuing as follows:

"As agreed from our past correspondence that all payments of steel would be made direct to M/s. Malayawata Steel Berhad, we shall be obliged if all payments for steel in future would be made in accordance with the agreed arrangements.

In the meantime, we request that you send your T.A.Q.S. to measure our works done and credit our amount to M/s. Malayawata Steel Berhad to make up the sum of $109,920 in order to rectify the error which have arisen due to an oversight. For easy reference, we attach herewith photostat copies of the letters mentioned above."

That letter is also inconsistent with the whole progress payment being due to MSB.

On December 27, 1968 MSB wrote to PWD in effect saying that $109,920 of the 7th progress payment should have been paid direct to MSB: this does not assert that the whole of the progress payment should on the figures of steel supplied have been so paid.

On December 31, 1968 NKH wrote — copy to MSB — enclosing certified copies of three more invoices for MSB steel that "has been delivered to the [Radio House] Site", the value being $42,633.86, and requesting payment thereof direct to MSB. This brought the total of certified invoices to $371,302: compare letter of November 21, 1968 MSB to PWD giving a total of invoices for steel so delivered of $371,293: against which MSB had only received $108,767. These three further invoices were "Remarked" as "To K.L.".

This letter was, so to speak, overtaken on January 16, 1969 when NKH forwarded to PWD 14 more certified invoices value $155,696.68, making as the letter indicated a total recently certified of $198,335.54. The letter concluded:

"The interim amount payable to Malayawata Steel Berhad would be the sum total of amounts mentioned in this letter and that of the 31st December 1968.

Please make this payment direct to Messrs. Malayawata Steel Berhad as the 8th Progress Payment for the month of January 1969."

Meanwhile PWD determined a figure of $141,450 for the 8th progress payment. At or before this NKH were plainly in cash flow trouble. In connection with the original idea of a guarantee by PWD of MSB's accounts, there was talk of a 90-day credit by MSB to NKH. On January 18, 1969 NKH tried to apply this to the different system that in the event operated, and thereby to prevent payment of the 8th progress payment to MSB. MSB on receipt of a copy of that letter would have none of it. MSB wrote to PWD on January 28, 1969 pointing out that they had delivered "as you can see" to NKH for the Radio House project steel bars to the value of over $400,000 (in fact $427,191), and that even taking into account the 8th progress payment of $141,450 there would still remain a balance of over $276,000. The actual figure was $526,991; "over $400,000" was what was still owed for after deducting the 4th progress payment: "over $276,000" was actually $276,774. The letter concluded:

"We shall be obliged if you will kindly ensure that M/s Ng Kong Hooi Construction abide by the agreement entered into and confirmed by you and the Treasury, and that the J.K.R. continue with their present arrangement of paying us direct any monies due to us whenever any progress payment is due to be made to Ng Kong Hooi Construction."

This letter plainly asserts that by the original arrangement the whole of a progress payment was to be earmarked for direct payment to MSB.

On the same date, January 28, 1969, MSB wrote to NKH. In the course of this letter MSB said this: —

"... it was agreed that we would supply you steel, for this project on your authorising J.K.R. to deduct the amount of the value of the steel we deliver to you from any interim payment due to you, and that any amount due to us for material supplied should be paid direct to us."

The same letter contains the following passage to which attention was drawn as running contrary to an arrangement under which the *whole* of any progress payment was to be paid direct to MSB in so far as NKH was then indebted to MSB for steel bars supplied for the project. That passage runs: —

"We understand from the J.K.R. that payment made to us represents only 75 per cent of the value of the goods delivered to you in accordance with our invoices certified by you and submitted to the J.K.R. You will therefore see that on all deliveries made to you, we are getting only 75 per cent of the value of the steel bars, and we presume the balance of 25 per cent will only be paid to us when the project is completed. We should like to have your advices on this point."

Their Lordships agree that that passage displays some confusion of thought, perhaps understandable in the light of the fact that for calculation of progress

payments steel bars on site were brought in at only 75 per cent of value; but they do not consider that it either varies what was agreed in July 1968, or suggests that what was then agreed lacked a sufficient degree of clarity to constitute an equitable assignment. On February 1, 1969 NKH backed down, said that they understood that the 8th progress payment of $141,450 would soon be received by MSB, and that NKH would "request" PWD to make another payment in March, copy of that letter to PWD constituting such request. The whole of the 8th payment was duly made to MSB by PWD. This left due for steel bars (on certified invoices) $276,774.

On February 1, 1969 NKH applied to PWD for a 9th progress payment. This was estimated for PWD on February 5, 1969 at $203,229. No part of that sum was paid to MSB: all was paid to NKH. On February 3, 1969 NKH had written to PWD, having apparently changed their bank, asking that thereafter all payments due to them should be made payable to NKH at a new account.

On March 1, 1969 MSB wrote in reply to the letter of February 1 to them from NKH with some indignation, still put out by the 90-day credit suggestion. The letter finished:

"We believe that you have requested the J.K.R. to make another payment to us in March, and we look forward to receiving this payment. Please advise what the sum is likely to be."

On March 7, 1969 NKH wrote to MSB a soothing answer, carefully not referring to the fact that NKH had received the 9th progress payment of $203,229 in February.

On March 8, 1969 a 10th progress payment calculation of $45,000 was made by PWD.

On April 11, 1969 MSB wrote to PWD with some indignation having discovered the payment of the whole of the 9th progress payment to NKH — "*part* of which should rightly be paid to us". Some confusion is also displayed by a phrase "We were supposed to receive 75 per cent of the value of the steel bars...". MSB asked when they could expect further progress payments from PWD.

It is of course true that if there had been an equitable assignment, and if MSB had appreciated its consequences in point of law, that would have been a most appropriate moment to assert a legal claim to be paid immediately by PWD the sum of the 9th progress payment notwithstanding that it had been paid to NKH. But if there was an equitable assignment it would not have been negatived by a failure then to assert it, whether that failure stemmed from delicacy of feeling in dealing with the Government or from ignorance of legal rights.

On the same date, April 11, 1969, MSB wrote to NKH enclosing copy of the last letter requesting NKH to ensure that substantial progress payments be made directly to MSB, and more rapidly.

In April 1969 the 10th progress payment of $45,000 was paid direct to MSB and on May 27 the 11th progress payment of $7,155 was similarly made, leaving $224,619 outstanding.

On April 26, 1969 MSB had written to NKH, copy to PWD, confirming that it had been agreed in discussion that NKH would instruct PWD to make the 11th progress payment direct to MSB and to make similarly progressive monthly payments until NKH's outstanding debt was settled.

On April 28, 1969 NKH had requested of PWD recommendations of an 11th progress payment, to be made direct to MSB.

On July 1, 1969 MSB wrote to NKH complaining that $224,618 odd was still owing in respect of steel bars supplied for the Radio House project and that the last payment was $7,155 (erroneously referred to as "part" of the 11th progress payment). The letter went on in terms similar to the letter of April 26 in relation to a 12th progress payment and future ones.

A 12th progress payment of $1,500 was made in fact to NKH. This was reported by NKH to MSB and the sum was paid over by NKH to MSB on July 22.

On July 23, MSB wrote to NKH in relation to 13th and future progress payments in terms similar to the letters of April 26 and July 1.

On July 30, NKH sought a 13th progress payment from PWD — no copy to MSB — requesting payment to NKH at a new bank.

On August 7, 1969 MSB wrote to NKH trusting that NKH would as arranged instruct PWD to make the impending 13th progress payment direct to MSB. On the same day MSB wrote to PWD: in that letter MSB said:

"In view of early arrangements made between Ng Kong Hooi and ourselves, with the agreement of the J.K.R. and Treasury, we shall be grateful if you will kindly arrange to make payment direct to us in respect of 13th Progress Payment."

The "early arrangements" there referred to are of course the July arrangements now asserted to be an equitable assignment. That letter also pointed out that $223,118 was still owed for steel bars supplied to NKH for the Radio House project. It would however appear (letter of August 12 PWD to NKH) that a 13th progress payment of $6,420 was paid to NKH by PWD at its new bank account (see letter NKH to PWD of July 30).

On August 23, 1969 MSB protested to NKH (copy to PWD) at this payment to NKH as being "contrary to the agreement made between us for the supply of steel to you for the above [Radio House] project", and demanding payment over of the $6,420 of progress payment No. 13. NKH replied on September 11, 1969 that they were forced to do this because otherwise they could not pay their workers and might otherwise lose the Radio House contract: but sent $1,500 to mollify MSB: they suggested a modification by which from future progress payments there should before payment to MSB be deducted a sum for minor materials and wages on the site.

A 14th progress payment of $15,246 was passed and on September 15th 1969 NKH told MSB of this and that it was intended to use this towards payment for two extra concrete mixers for the work on the site.

On September 17, 1969 solicitors for MSB wrote to NKH complaining of failure to meet their liabilities to MSB, and suggesting minimum requirements for repayment. (The letter said that $223,118 was still owing: but this did not allow for the last payment by NKH of $1,500, which left $221,618). This letter was copied to PWD.

NKH replied on September 24, 1969 stressing the top priority to Government of the project and indicating generally that MSB was doing well from it and should not upset the apple cart.

On October 1, 1969 NKH asked PWD for a 15th progress payment, indicating that they intended that from it an amount not less than $5,000 should be paid direct to MSB. In due course $6,000 was paid direct to MSB by PWD, out of a 15th progress payment of $48,015. That left $215,619: and that is the end of the story of progress payments to NKH. The building contract was shortly thereafter determined by PWD for default by NKH.

The situation in summary, if there was an equitable assignment, was as follows, taking the dates of *certification* to PWD by NKH of invoices for steel as delivered by MSB to site for the project. If the 6th and 7th progress payments had been paid direct to MSB, as well as the 4th and 5th, the 9th such payment of $203,229 would have been ample to cover the remaining $87,535. The claim in this action against the respondent Government is therefore quantitatively justified at $215,618 unless there is some general or special defence.

Their Lordships consider first the question whether the equitable assignment already described is established. Both the trial judge and the Federal Court held that it was not. To some extent their Lordships have already indicated a view on this point.

The trial judge held that there was no equitable assignment in effect on the ground that the arrangement was subject to a condition that NKH should in respect of any progress payment retain the ability to decide whether and to what extent they should instruct PWD to pay all or part of any progress payment to MSB. In the learned judge's view the correspondence in September 1968 amounted to this: that only after verification and checking by NKH were invoices to be forwarded to PWD: and that when forwarding the invoices NKH should indicate to PWD the amount to be deducted from its progress payment. Thus, he held the "assignment" became conditional and severable and could not rank as an assignment. Their Lordships are of opinion that that conclusion is not correct; that what was arranged as to the checking and certification is not properly to be described otherwise than as mere machinery for the operation of the equitable assignment constituted by the earlier agreement; and that there is no justification for the conclusion that NKH was to be at liberty to decide, otherwise than by the proper operation of that machinery, when and how much of any progress payment was to be paid direct to MSB. It is to be observed, as already noted, that the claim of MSB against PWD is established on the basis of certified invoices under the machinery. Moreover there was no question of consideration of the state of accounts pro and con between MSB and NKH. The learned judge found support for his opinion from the way in which affairs in fact later progressed. Their Lordships have already indicated that this is unsound ground upon which to dispute the character and scope of that which had been earlier agreed in writing.

The judgment of the Federal Court on this question was delivered by Raja Azlan Shah F.J. sitting with Suffian L.P. and Wan Suleiman F.J. Their Lordships do not think it necessary to refer to the reasons of the Federal Court, because they substantially coincided with those of the trial judge.

In their Lordships' opinion accordingly there was here a valid equitable assignment of progress payments due to NKH by MSB in so far as payment for the relevant steel was due and outstanding.

There remain for consideration three points which were not dealt with by the Federal Court but upon two of which the trial judge would have decided adversely to the present appellants.

The first of these was based upon waiver by MSB of their claim against PWD, in that MSB had issued a writ, for the (approximate) amount claimed under the assignment, against NKH. Counsel for the Government, rightly in their Lordships' opinion, found himself unable to support that ground.

Before the trial judge and this Board an attempt was made to assert an estoppel against MSB. As to this little or no detail was pleaded, and no evidence was led for the Government to suggest that PWD or anyone else representing the Government had acted or refrained from acting in reliance upon anything said or done or not said or not done by MSB. In those circumstances the plea of estoppel must fail.

The third point is this: the trial judge came to the conclusion on the evidence that MSB had failed to establish that any of the steel bars supplied by MSB to NKH had been so supplied to the Radio House site for the project to an extent that would support the balance claim against PWD. He considered, and their Lordships agree, that PWD would only be liable for the value of MSB steel actually brought on to the particular site, and that the burden was on MSB to prove that value. So far as value was concerned the value of the certified invoices was not challenged: the trial judge relied on an alleged uncertainty of amounts of steel.

Khoo Soo Pin, the Manager of the business department of MSB, gave precise evidence that all the steel bars the subject of the four sets of certified invoices had been delivered to NKH for the construction of Radio House and at the Radio House site. In cross-examination it was put that only some of the invoices expressly referred (in the Remarks column) to the particular site, and some said "to K.L.", but he did not on this ground resile at all from his overall statement as to delivery, except to say that he agreed that NKH was engaged on other projects and that it was possible that NKH had used some steel for other projects. Their Lordships have already drawn attention to the documentation which entirely supports that

evidence that all MSB steel bars had been delivered to the Radio House site for that project, and do not here repeat it: they see no reason to conclude from the fact that some invoices did not spell that out in full in the "Remarks" column that MSB and NKH arranged for some deliveries to be made elsewhere or for another use.

The Government called no evidence, but the appellants called Mr. Singarajah, who was the Quantity Surveyor for the project. He said that he was in no position to say whether all the steel had been delivered to the site: he could not dispute one way or the other. He said there were site diaries kept by the resident engineer to record materials brought to the site. His evidence in chief was mainly concerned with progress payment calculations. In cross-examination he said that the site was handed over to the substituted contractor about five months after termination of the contract with NKH. At that stage he said that the amount of incorporated steel was 789 tons and unincorporated on site was about 578 tons of various sizes: even if that total was all MSB steel it (1,367 tons) would still be 62 tons short of the four sets of certified invoices: moreover he estimated that of the 1,367 tons 501 would have come from other suppliers, leaving 866 from MSB. Even that 866 need not necessarily have come from MSB. However two significant matters are to be noted: one is that NKH were engaged in another building project: the other is that the witness said that at night there was nothing to stop the contractor NKH from taking materials out of the site without being detected by PWD. He made mention of the site diaries but not of what was shown in them.

The trial judge in dealing with this question drew attention to the figure of 1,429 tons in the certified invoices, and that figure of 866 given by the Quantity Surveyor as an estimate of the MSB proportion of the 1,367 tons handed over (in building and on site) to the new contractor. He placed considerable reliance on the fact that some invoices only said "To K.L." as suggesting that they referred to deliveries by MSB to NKH otherwise than to the Radio House site for that project, contrary to the express evidence of the Business Manager of MSB and contrary to every other indication in the documents. He made no mention of the fact that NKH could have removed at night material delivered by MSB to the site for the Radio House project. Beyond saying that the site diaries complicated the situation by other figures he said no more of them.

The trial judge concluded that the conflicting evidence showed that the total quantity of steel supplied by MSB for the construction of Radio House could not be properly ascertained, that it was not the duty of the court to speculate on the actual worth of steel supplied by MSB, and that (assuming there was an equitable assignment) MSB had failed to prove that the sum of $215,618 claimed in the statement of claim should have been paid by PWD under the assignment. Their Lordships are of opinion that this conclusion was not justified in light of the documents which consistently refer to MSB steel bars being supplied at the site for the project (apart from the "To K.L." invoices which are quite consistent with such supply): of the fact that MSB were looking to progress payments for their payment and would be unlikely to cut down the progress payments by delivery elsewhere for a different purpose: of the fact that the Quantity Surveyor's evidence of tonnage started with what was left in the building and on site months after the 1st certified invoice: of the evidence that NKH could have removed materials after delivery to the Radio House site without PWD knowing: and of the evidence of the Business Manager of MSB.

In all the circumstances their Lordships are of opinion that the appeal should be allowed, with costs here and in the courts below, and judgment entered against the respondent Government for the sum of $215,618 with interest thereon at 6 per cent per annum from the date of order at first instance (August 13, 1974) until payment, and they will advise His Majesty the Yang di-Pertuan Agong accordingly.

Appeal allowed.

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